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Filing date: **05/19/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |  |
|------------------------|--|
| Proceeding             | 92052197   |
| Party                  | Plaintiff<br>Terri Yenko Gould, Executor   |
| Correspondence Address | George E. Bullwinkel<br>425 Woodside Avenue<br>Hinsdale, IL 60521<br>UNITED STATES<br>geb@bullwinkel.com |
| Submission             | Opposition/Response to Motion  |
| Filer's Name           | George E. Bullwinkel   |
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| Signature              | /George E. Bullwinkel/   |
| Date                   | 05/19/2011   |
| Attachments            | OPPOSITION to GMCI motion to strike.pdf ( 8 pages )(33160 bytes )  |

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|                                |   |                       |
|--------------------------------|---|-----------------------|
| Terri Yenko Gould, Executor,   | ) |                       |
|                                | ) |                       |
| Petitioner                     | ) |                       |
|                                | ) |                       |
| v.                             | ) | Cancellation 92052197 |
|                                | ) |                       |
| SuperCar Collectibles, Limited | ) |                       |
|                                | ) |                       |
| Registrant                     | ) |                       |
|                                | ) |                       |

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**PETITIONER'S OPPOSITION TO RESPONDENT'S  
MOTION TO STRIKE TESTIMONIAL DECLARATIONS**

The Executor of the Estate of Donald Frank Yenko, (The Estate) Petitioner herein, hereby opposes the Respondent/ Registrant General Marketing Capital Inc.'s ("GMCI") motion to strike its testimonial declarations, citing 37 CF.R. §2.119, §2.121 and §2.132.

GMCI seeks to win this case by default. Having made no expert disclosures, taken no depositions, made no pretrial disclosures, and filed no testimony of its own, it moves to strike (and thereafter to dismiss) this entire proceeding for three reasons:

1. GMCI never agreed to let the Estate file its testimony in affidavit or declaration form. That much is true. The Estate's invitation to stipulate under 37 CFR 2.123(b) was never accepted. The Estate filed the testimony anyway, because it was assumed (wrongly, it appears) that if GMCI wanted a testimonial record it would have already acted on the Estate's September 2010 Pretrial Disclosure (Appendix A) and taken the testimony of those witnesses. (Counsel now claims he was unaware of this disclosure. See point 2. below.)

GMCI correctly cites *Order Sons of Italy In America v. Memphis Mafia Inc.*, 52 USPQ2d 1364 (TTAB 1999) as authority for striking such non-stipulated testimony. But it fails to point

out the most important part of this opinion: "*We deny applicant's motion to strike because we find it is reasonable to permit opposer to respond to applicant's objections*".<sup>1</sup>

Given GMCI's failure to act on the documents and witnesses revealed in the September 2010 Pretrial Disclosure, the Estate agrees that it would be reasonable to extend GMCI's testimony period by an additional 30 days to allow it to take the depositions of the declarants and thus obviate any objections to their testimony. If GMCI is not willing to do that, then its objections should be overruled and the declarations admitted.

2. The Estate made no "expert disclosure" of its testimonial witnesses. Each of the declarations consists entirely of "*opinions or inferences which are admissible under Rule 701, Federal Rules of Evidence., as (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702*". This is lay testimony, not expert.

GMCI's argument is not just specious, it is fatally undercut by Mr. Buyan's false (and we assume simply mistaken) assertion that the Respondent "*received no pretrial disclosure from Petition as required by §2.121*". That disclosure (a copy of which is attached as Appendix A) was sent to Respondent's former counsel on June 14, 2010 as required by the scheduling order then in effect. Though the order was revised after GMCI acquired the subject registration and substituted Mr. Buyan as its new counsel, that is not an excuse for Mr. Buyan to pretend that nothing at all happened prior to his entering. If he neglected to acquire the case file from his predecessor, that is not the Estate's fault.

3. The declarations were not served in accordance with 37 CF.R. §2.119. As urged in the Estate's Supplemental Motion To File Out of Time, this is a remarkable reversal, considering that Respondent's counsel Mr. Buyan (along with his predecessor Mr. Scott Johnson)

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<sup>1</sup> GMCI's other citation, *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400 (TTAB 1998), is designated "*not citable as precedent*" and may thus be disregarded.

have from April 2008 through January 2011 - a period of over three years - uncomplainingly sent and/or accepted at least one hundred eight (108) electronic communications and transmittals to and from the undersigned. If not implied consent, these actions are certainly a waiver of objection to communication and service by electronic means.

(Paper copies of this and other documents filed electronically today are also being served by mail to forestall yet another unnecessary objection pertaining to service.)

#### CONCLUSION

In the interest of justice, and in order to give both parties a full and fair opportunity to present their cases, the Respondent/ Registrant General Marketing Capital Inc.'s ("GMCI") motion to strike its testimonial declarations under 37 CF.R. §2.119, §2.121 and §2.132 be denied. In the alternative, the Estate would consent to granting GMCI an additional thirty days to depose and cross-examine the declarants in order to obviate its current objections.

Date: May 19, 2011

Respectfully submitted

/George E. Bullwinkel/

George E. Bullwinkel  
Attorney for Petitioner

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**APPENDIX A**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|   |   |                       |
|---|---|-----------------------|
| Terri Yenko Gould, Executor,              | ) |                       |
|   | ) |                       |
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| v.  | ) | Cancellation 92052197 |
|   | ) |                       |
| SuperCar Collectibles, Limited            | ) |                       |
|   | ) |                       |
| Registrant                                | ) |                       |
| <hr style="width: 45%; margin-left: 0;"/> |   |                       |

**PETITIONER'S INITIAL DISCLOSURE STATEMENT**

Pursuant to Rule 2.120(a) of the Rules of Practice In Trademark Cases (2007) and the Board's Scheduling Order of March 15, 2010, Petitioner hereby makes the following initial disclosures.

1.     WITNESSES. Petitioner may call one or more of the following evidentiary witnesses in support of its petition. A brief summary of the expected testimony of each witness is provided.

a)     Terri Yenko Gould, 4662 White Avenue, Encino, CA 91316. Ms. Gould is expected to testify that: she is the daughter of Donald Frank Yenko, and as a young girl worked with her father in preparing YENKO automobiles in the 1960s; that upon her father's death in March, 1987 she became executor of his estate; that she is the sole legal representative of the Estate for all purposes; that neither she nor the Estate have ever granted permission or license to others to utilize the name and mark YENKO (other than the Yenko Sportscar Club); and that she has been approached on several occasions to grant such permission but has consistently refused.

b)     Thomas Clary, 306 Water Street, Alton, MO 65606. Mr. Clary is expected to testify that he founded the Yenko Sportscar Club in 1998 pursuant to written permission and license from the Yenko Estate; that the Club developed and continues to enjoy a large following

of automobile enthusiasts; and that the Club tracks and keeps records of all YENKO automobiles and of their present owners and locations. Mr. Clary may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the likelihood of damage to its commercial value from unauthorized infringers.

c) Lester Quam, 3240 W. Irving Park Road, Chicago, IL 60618. Mr. Quam is expected to offer personal testimony of his experiences as a long-time owner and enthusiast of YENKO automobiles. He may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the effects of dilution and damage to commercial value caused by unauthorized infringement, including but not limited to Revell's manufacture and sale of YENKO replica model cars under a purported license from the Respondent.

2. Edward J. Cunneen, 143 West View Street, Lombard, IL 60148. Mr. Cunneen is expected to offer personal testimony that he has over many years been involved in the hobby of owning and collecting automobiles, particularly YENKO automobiles, having written at least one book on the subject; and that he has often served as an expert in inspecting and documenting YENKO automobiles. He may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles.

3. DOCUMENTS. Petitioner may offer into evidence one or more of the below-listed documents, copies of which are provided herewith:

a) Last will and testament of Donald Frank Yenke (Exhibit 1, to be provided when available).

b) A letter of permission (license) dated January 26, 1998 from the Estate of Donald Frank Yenke to the Yenke Sportscar Club of Alton, Missouri (Exhibit 2).

c) Representative documents demonstrating the continuing fame and reputation of Donald Frank Yenke and the name YENKO, including but not limited to the following:

- YENKO general history (Exhibit 3)
- YENKO detailed history of models, years, and production numbers (Exhibit 4)
- YENKO Production History, 1966-1981 (Exhibit 5)
- Motor Trend CLASSIC magazine, Spring 2010 special edition – cover and eight internal pages of photos and text (Exhibit 6)
- POPULAR MECHANICS magazine article reprint, Spring 1997 (Exhibit 7)
- ROTTEN TOMATOES Internet movie review, “The Fast And The Furious”, 2009 (Exhibit 8)
- THE FAST LANE Internet advertisement for replica Yenke Camaro S/C, Spring 2010 (Exhibit 9)
- CAR TECH advertisement for book “YENKO, The Man, The Machines, The Legend”, 2010 (Exhibit 10)
- Revell Model Kit No. 85-4237 '69 Chevy Nova “YENKO” (photos, Exhibit 11)
- Photo Group Exhibit: YENKO Cars At November 2009 Chicago Show (Exhibit 12)
- Photo: YENKO Model Cars At November 2009 Chicago Show (Exhibit 13)
- Photo Group Exhibit: Models of Historic YENKO High Performance Cars (Exhibit 14)
- Letter, attorney Bullwinkel to Revell, Inc., February 12, 2010 (Exhibit 15)
- Letter, attorney Bullwinkel to Sullivan, December 11, 2009 (Exhibit 16)
- Pennsylvania Statutes, Sec. 8316 (Exhibit 17)
- California Civil Code, Sections 3334, 990 (Exhibit 18)

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George E. Bullwinkel  
Attorney for Petitioner

Date: June 14, 2010

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Fax: (630) 214-3210

### **CERTIFICATE OF SERVICE**

George E. Bullwinkel, an attorney of record, hereby certifies that one copy of the foregoing PETITIONER'S INITIAL DISCLOSURE STATEMENT was served by mailing, first class postage prepaid, on June 14, 2010 to the following:

Scott W. Johnson and  
Heather J. Kliebenstein  
Merchant & Gould P.C.  
3200 IDS Center  
80 Sough Eighth Street  
Minneapolis, MN 55402-2215

Attorneys for Respondent

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George E. Bullwinkel



## **CERTIFICATE OF SERVICE**

George E. Bullwinkel, an attorney of record, hereby certifies that one copy of the foregoing PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT UNDER 37 CF.R. §2.132 was served by mailing, first class, postage prepaid, on May 19, 2011, and also by electronic mail, to the following:

Robert D. Buyan  
Stout, Uxa, Buyan & Mullins, LLP  
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Irvine, CA 92618

email *rbuyan@patlawyers.com*

Attorney for Respondent

/George E. Bullwinkel/  
George E. Bullwinkel